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Docket #

March 3, 2004

03-211

02-361

EX PARTE

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, DC 20554

RECEIVED

MAR - 3 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Letter and Memorandum by SBC Communications, Inc., Urging the Commission to Deny AT&T's Access Charge Avoidance Petition from James C. Smith of SBC dated January 14, 2004

Dear Ms. Dortch:

UniPoint Enhanced Services, Inc. d/b/a PointOne ("PointOne"), pursuant to Section 1.1206(b) of the Commission's rules, hereby submits this ex parte response to the above-referenced letter.

Pursuant to Section 1.1206(b) of the Commission's rules, two (2) copies of this letter are being submitted for filing.

Respectfully submitted,



Kemal Hawa

Chadbourne & Parke LLP
Counsel for PointOne

Enclosures

cc: Service List

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041

March 3, 2004

EX PARTE**VIA ELECTRONIC SUBMISSION**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE Letter and "Memorandum by SBC Communications, Inc., Urging the Commission to Deny AT&T's Access Charge Avoidance Petition" from James C. Smith of SBC dated January 14, 2004 (the "SBC Memo")

Dear Ms. Dortch:

PointOne¹ is filing this ex parte policy letter in an effort to ensure that ESPs, ISPs, and other communications innovators are able to continue to develop IP communications applications that touch both the PSTN and IP networks. There is concern due to recent and much publicized possible future denial of the AT&T VOIP petition² that PSTN network elements will be inappropriately withheld from ESP's and ISP's. PointOne is fearful that a non-descriptive ruling against AT&T coupled with no additional response to SBC's January 14, 2004 ex parte policy memo to the FCC will allow SBC to continue to partake in anticompetitive self help acts that hamper valid Voice over IP businesses, business plans, and business services. Additionally, if the Commission fails to explicitly reaffirm the enhanced/information service provider exemption ("*ISP Exemption*"), in a ruling that denies the AT&T petition, the unlikely unintended result will be the assessing of access charges on dial-up narrowband Internet connections and services - a result that would have deleterious affects as would a tax on the Internet.

SBC's policy memorandum does raise a single ripe legal issue under the existing telecom regulatory paradigm, specifically as to whether an existing IXC under the current FCC definition is prohibited from claiming an Enhanced Service Provider Exemption for itself because of its IXC status. SBC points to FCC rule 69.5 - which on its face only applies to IXCs - to support its position. PointOne agrees that a plausible legal decision would be to state that FCC Rule 69.5 prevents a certified and traditional IXC such as AT&T from also making an affirmative claim that traffic it (the IXC) terminates through any direct physical

¹ UniPoint Enhanced Services, Inc. dba PointOne

² **FCC Is Poised to Clarify Future of Internet Phone Calls** - *Wall Street Journal*, January 20, 2004 states in part "In the next month or so, the FCC is expected to reject AT&T's claim that it should be exempt paying costly fees to local-phone companies such as SBC if much of a call travels over the Internet rather than the public phone system, FCC and industry officials say"

connection between AT&T controlled facilities and SBC controlled facilities is exempt from access charges via a traditional FSP exemption.

However, the remaining bulk of the ex parte letter and policy memorandum from SBC describing "IP in the Middle" schemes and other tests based on device types (e.g. plain old telephone service) to decide when an exemption may actually apply not only goes well beyond the narrow scope of the AT&T/SBC dispute, but cleverly imposes SBC invented boundaries on the real debate surrounding the future of Voice over Internet Protocol -- a real debate which the FCC has stated it will address comprehensively in a Notice of Proposed Rule Making. While some policy makers may dismiss this dicta by SBC as harmless, in truth, it is not. PointOne believes that a more holistic approach in clarifying the *ISP Exemption* is necessary. Such an approach was suggested in the *PointOne Test*¹ in a recent filing with the FCC.

PointOne has presented to the FCC⁴ that ESP's and ISP's are nothing like IXC's. PointOne is an ESP/ISP and a technology company. Our private investment of over \$150,000,000 has been applied to research, development and facilities exclusively for VoIP technologies since 1998, and we have never sought to be a traditional IXC. PointOne affirmatively asserts its ESP exemption which carries the benefits of avoiding non-cost based charges intended to be placed on traditional telecommunications services and providers, but also does not supply the rights of interconnection to the ILEC that traditional IXCs and LECs have. PointOne does pay for its services, and pays all requisite taxes and fees as if it were an end user⁵. It should also be noted that just because PointOne contributes to the universal service fund, its services should not be considered a "telecommunications service", as SBC deduces in regards to AT&T's VoIP service in their memorandum⁶.

We continually push the edge on technology applications and integration of different technologies, we create more efficient networks, more efficient control of networks, new applications and different products and services. Many of PointOne's products are also sold on a non-usage sensitive basis. In short PointOne generally meets all of the policy reasons for the creation of the Enhanced Service Provider exemption. Over the past 7 years, in part because we have been able to claim the ESP exemption, we have invested capital and have created new products, have innovated and have invented. We have one of the largest IP networks in the country operating in a technology that has now shown itself to become a large part of America's economic future. We are in the middle and on the edge. We are not

¹ See PointOne's Ex Parte letter Re *The Point One Proposal To Reaffirm The Existing ISP Exemption* filed on February 24, 2004.

⁴ January 7, 2004 presentation.

⁵ Because PointOne buys its services as an end-user, as ESPs are required to do, PointOne pays local fees and charges in its service market areas, such as state and federal sales tax, and USF among others. This is tax revenue that the federal, state, and local authorities would not otherwise receive if PointOne purchased services as a telecommunications reseller vs. an end-user.

⁶ See "Memorandum by SBC Communications, Inc., Urging the Commission to Deny AT&T's Access Charge Avoidance Petition" dated January 14, 2004 pages 3-4.

legacy IXC We are IP. We are a bridge that allows old technology to communicate seamlessly with new technology. We are a Voice over IP enhanced service provider in the purest sense of the word.

Focusing only on SBC's dicta, however, PointOne or any other ISP/ESP providing VoIP services is theoretically no different than AT&T. However, the FCC has a very simple way to dismiss the dicta by SBC as harmless - it need only to focus and sustain one important point AT&T is governed under FCC Rule 69.5, and "True ESPs" such as PointOne who wish to affirmatively claim the ESP exemption are not.

PointOne welcomes the opportunity to be heard in full when the FCC issues its NPRM regarding the possible creation of a new regulatory paradigm to govern the new technical reality of Voice over Internet Protocol.

The FCC should make clear that the multiple policy issues raised in the SBC Memo (as well as the many policy issues not raised), cannot be asked and answered by unfair business practices imposed by a monopoly PointOne is concerned that SBC will attempt to impose the views articulated in the SBC Memo on the industry. Under the views expressed in the SBC Memo, anyone who does not serve a small retail end-user through a broadband connection would be prohibited from claiming an ESP exemption⁷. It is important to recognize that this method of delivering VoIP services is only one of many being deployed now and in the coming years. This assumes that the technology is able to flourish and will not be stifled with the burden of telecommunications principles over 60 years old.

PointOne believes that the FCC should not rule on the AT&T petition prior to at least hearing and evaluating initial comments in the NPRM proceedings. If a ruling denying AT&T's petition is made prior to or abruptly after the beginning of the NPRM proceedings, it will cause the ILECs to engage in even more self-help measures that will likely set back the IP Communications industry years. Those engaging in self-help measures will take the view that, by not addressing the views in the SBC Memo, the FCC already has defined the difference between good VoIP and bad VoIP. PointOne requests that if the FCC does in fact rule against AT&T in this proceeding, that it also makes the following clarifications:

- 1) The ruling only applies to IXCs who are originating or terminating traffic directly with the ILEC under FCC rule 69.5;
- 2) The ruling in no way limits the ability for an ESP/ISP who is not an IXC to provide any service;
- 3) The ruling in no way limits the ability for an ESP/ISP who is not an IXC to continue to claim the ESP exemption;

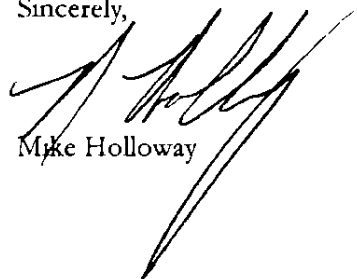
⁷ This is even more problematic when SBC affiliates are offering "UNLIMITED LONG DISTANCE CALLING" at a flat rate of \$20 per month (see service description from SBC's website http://www01.sbc.com/Products_Services/Residential/ProdInfo_1/1,1091--6-3-19,00.html), SBC wishes to create an unfair market advantage for itself by simultaneously limiting the ability for new technology providers to acquire "access like" products at a flat rate through use of the ESP exemption while at the same time offering a flat rate using its old technology and affiliate transactions.

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- 4) ILECs should be prohibited from requiring CLECs to segregate ESP/ISP traffic from other locally treated traffic for interconnection purposes;
- 5) ILECs should be prohibited from claiming access charges from CLECs who provide services to ESPs who are availing themselves of the ESP exemption;
- 6) ILECs should be prohibited from blacklisting companies and/or technologies either directly or indirectly because of their positions on Voice over Internet Protocol and their possible use of ESP services.

It is only with this clarification that the FCC will be supporting the advancement of true next generation network providers, investment in all forms of Voice over IP services, and providing the American consumer with the choices they have requested and deserve from this technology

Sincerely,



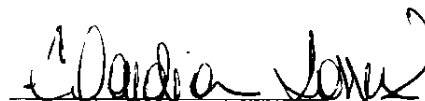
Mike Holloway

Attachment

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Commissioner Kathleen Abemathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathon Adelstein
Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Scott Bergman
Daniel Gonzalez

CERTIFICATE OF SERVICE

I, Claudia F. Torres, hereby certify that true and correct copies of the foregoing Ex-Parte response were sent by hand delivery and fax to the following individuals on this 3rd day of March, 2004


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